Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC. TO RESPONSES TO SPECIFIC QUESTIONS

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MARCH 27, 1997

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SUMMARY

In these Further Comments, SBC Communications Inc. responds to the Further Comments requesting that the Commission promulgate regulations that are inconsistent with the letter and spirit of the CPNI provisions of the Telecommunications Act of 1996 and with the privacy expectations of consumers, as follows:

- Section 222 is about privacy of customer information, and the Commission should promulgate regulations, if any, that conform to customers' reasonable privacy expectations. Accordingly, it is reasonable to allow a notice and opt-out form of approval to telecommunications businesses with respect to their use of their own CPNI or where they disclose or permit access to such CPNI to their affiliates. It is not, however, reasonable to conclude that the same form of approval is sufficient to apprise customers that their CPNI may be provided to those outside of the business enterprise.

- The Commission should not depart from its frequently reiterated position that CPNI is integral to the joint marketing of multiple services. The Commission should, instead, conclude that a BOC's use of CPNI or its provision of or permitting access to CPNI to a Section 272 affiliate for joint marketing purposes are exempted activities under Section 272(g)(3).

- The exercise of the joint marketing freedoms Congress expressly authorized under Section 272(g) may not be restricted by general statutory language found elsewhere in the 1996 Act. Sections 201(b) and 202(a) cannot be used in conjunction with Section 272(f) to achieve a result at odds with both the letter and spirit of Section 272(g) or the more specific statutory provisions of Sections 222, 272, or 274.

- The Section 272(c)(1) non-discrimination obligation extends to information and other specified items "that a BOC provides to its Section 272 affiliate." This obligation does not extend to instances where covered items (including CPNI) either are used by the BOC alone or provided to an affiliate other than its Section 272 affiliate.

- Congress determined that Section 222 should apply evenhandedly to all "telecommunications carriers." The Commission should not allow subclasses of carriers, such as IXCs, to obtain access to BOC CPNI without the customer's requisite authorization.

- Section 272(c) is completely independent of Section 222. Applicable only to BOC Section 272 affiliates in a non-joint marketing context, Section 272(c)(1) requires only non-discriminatory treatment of BOC Section 272 affiliates vis-a-vis similarly situated, non-affiliated "entities." Nothing in Section 222--either in conjunction with Section 272 or not--requires a BOC to solicit approval for unaffiliated entities.

- The actual exercise of obtaining customer approval is not a "transaction with the Bell operating company." It is, instead, simply correspondence between the BOC and its customer. The "transaction," if any, associated with the BOC's seeking customer approval is not the solicitation service, but is instead, the passing of information.

- Only Section 222 affects CPNI in the context of a BOC and a Section 274 affiliate. To the extent that the BOC has obtained approval to use, disclose, or permit access to CPNI pursuant to Section 222(c)(1) for its affiliated or related electronic publishing entity or joint venture, it may do so. Where unaffiliated entities seek similar access, but have not obtained requisite customer authorization pursuant to Section 222(c)(2), the BOC may not use, disclose, or permit access to CPNI in providing inbound telemarketing to entities not within the scope of the Section 222(c) authorization. In addition, Section 274(c)(2)(B) does not apply to the BOC's own use of CPNI or affect the obligations of entities that seek to use CPNI pursuant to Section 222(c). Where a BOC provides CPNI to its separated affiliate in connection with an electronic publishing teaming or business arrangement, it must provide the CPNI to any teaming arrangements with unaffiliated electronic publishers on nondiscriminatory terms, provided they also have the requisite customer authorization.

The terms of Sections 222, 272, and 274 are unambiguous, and the Commission should not promulgate regulations to effectuate their terms. To the extent that the Commission issues rules through this proceeding, those rules must respect consumers' privacy expectations.

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Information and Other Customer	)	
Information	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.
TO RESPONSES TO SPECIFIC QUESTIONS

SBC Communications Inc. ("SBC"), by its attorneys, and on behalf of its subsidiaries, hereby offers these reply comments in response to the further comments filed by parties to the Commission's Public Notice Requesting Further Comment in connection with its Notice of Proposed Rulemaking in the above-referenced docket,[1] implementing and interpreting those portions of the Telecommunications Act of 1996[2] relating to Customer Proprietary Network Information ("CPNI") and other customer related information.[3]

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[1]DA 97-385, released February 20, 1997.

[2]Pub.L.No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151, et seq.(the "1996 Act")(citations to the 1996 Act will reference the codified section number, e.g., "Section ___").

[3]47 U.S.C. § 222.

I. INTRODUCTION

As the Commission has determined, after a BOC receives interLATA authorization under Section 271, it will be permitted to jointly market and sell interLATA services of its affiliate and "to engage in the same kind of marketing activities as other service providers."[4] CPNI is useful in this activity, if not essential to its success, and the use of CPNI in permissible joint marketing is consistent with both the terms of the 1996 Act and the Commission's precedent. As set forth in SBC's Further Comments and in this Reply, as well as in the Further Comments of others, the Commission has repeatedly recognized both the usefulness and importance of the appropriate use of customer information, and the Commission's Section 222-related rules must reflect that all telecommunications carriers will be given the same freedoms to use CPNI in ways that are consistent with customer expectations.

Section 222 is entitled, "Privacy of Customer Information," and the Commission's regulations under Section 222, if any, should implement customers' expectations. As the Commission has recognized in other areas, an opt-out procedure for obtaining customer approval for access to this CPNI meets these customer expectations; an opt-out procedure also fulfills the requirements of Section 222(c)(1). Consistent with Commission precedent, Congress recognized through the statutory structure of the 1996 Act that the use of CPNI in line with customers' privacy expectations is essential to the innovative types of marketing that would accompany the opening of telecommunications markets. At the same time, the 1996 Act's CPNI regime places control over the use, disclosure, and access to customer information in the hands of consumers.

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[4] In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, First Report and Order, CC Docket No. 96-149, FCC 96-489 (released December 24, 1996) ("Non-Accounting Safeguard First Report and Order"), para. 291.

Consistently with consumers' expectations and intent, a telecommunications carrier may use, disclose, or permit access to CPNI for the purpose of marketing, selling, and providing services.

Importantly, however, Congress did not make the requirements of Section 222 dependent upon the further requirements of Sections 272 and 274. Section 222 alone provides the mechanisms to protect CPNI from unreasonable use or disclosure and to permit the use or disclosure of CPNI consistent with customers' reasonable privacy expectations. Congress provided no mechanism in Sections 272 or Section 274 to permit use, disclosure, or access to CPNI where such access is not within the requisite authorization contemplated by Section 222. BOCs have but a limited nondiscrimination obligation under Section 272(c) and certain limitations upon joint marketing under Section 274. These limitations cannot be leveraged against the mechanisms codified in Section 222 to defeat Congressional intent to apply CPNI laws equally over all telecommunications carriers.

II. REPLY DISCUSSION

A. A NOTICE AND OPT-OUT APPROVAL PROCESS SHOULD APPLY ONLY TO THOSE BUSINESSES WHICH HAVE ALREADY DEVELOPED A RELATIONSHIP WITH THE CUSTOMER.

Customers--regardless of the industry under discussion--generally anticipate that those with whom they choose to do business will want to continue doing business with them. Further, customers expect that these businesses will reasonably employ account and other information to market and sell additional services or goods to them. What customers neither anticipate nor welcome is the prospect that a business with whom they have done business will disclose account and other information to businesses with whom no customer relationship has been formed.

Consumers of telecommunications services have the same expectations for the use of their CPNI. As the Commission has noted, it is not likely that customers "would want such material

routinely forwarded to otherwise unrelated [businesses] for marketing purposes."[5] Indeed, as US West details, the Commission has long sought to ensure that the CPNI rules are supportive of the existing business relationships of customers, while respecting customers' control in limiting disclosure to unrelated third parties.[6] As the Commission provided for AT&T in the customer premises equipment context, and for AT&T and McCaw in the context of their merger, no affirmative prior authorization requirement is necessary to protect consumers of services where existing relationships are present.[7] As the Commission has recognized, an opt-out procedure provides comsumers with "sufficient ability . . . to limit dissemination of [their] CPNI."[8]

In stating the general principle, if not the details of its execution, the Competition Policy Institute ("CPI") assesses Section 222 correctly: "[C]ontrol over [CPNI] should rest with the

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[5]In the Matter of BankAmerica Corporation, The Chase Manhattan Corporation, Citicorp, and MBNA America Bank, N.A. v. AT&T Co., Memorandum Opinion and Order, 8 FCC Rcd 8782 (1993) ("Universal Card Order"), at para. 26.

[6]US West at 6-10. See also Cincinnati Bell at 2-3 (citing "Analysis of Privacy Issues," prepared by Privacy and Legislative Associates, Inc., as submitted by Pacific Telesis in its January 24, 1997 ex parte letter to the Commission); U S West at 6 and nn. 12, 13.

AT&T, too, recognizes that, consistently with Commission precedent, "broad use of CPNI within a firm does not raise significant privacy concerns, and that consumers would not object to having their CPNI disclosed within a firm to increase the competitive offerings made to them." See AT&T at 3-4.

[7]See In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, CC Docket No. 90-623, Report and Order, 6 FCC Rcd. 7571, 7610, n. 155 (1991); In re: Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, For Consent to the Transfer of Control of McCaw Cellular Communications, Inc., and Its Subsidiaries, ENF 93-44, Memoradum Opinion and Order on Reconsideration, 10 FCC Rcd. 11786, ¶5 and n. 20, ¶12 and n. 39 (1995) ("AT&T/McCaw Order on Reconsideration") See also In the Mattter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph, 102 FCC 2d 655, at ¶66 (1985)("AT&T CPE Order").

[8]AT&T/McCaw Order on Reconsideration, 10 FCC Rcd 11786 at ¶12.

consumer."[9] With the exception of those purposes permitted by Section 222(c)(1)(A) and (B), the scope of disclosure of CPNI is, indeed, governed entirely by a telecommunications carrier's customer. Under Section 222(c)(1), a customer may authorize a carrier, including its affiliates, to use, disclose, or permit access to CPNI. Under Section 222(c)(2), a customer may require that a telecommunications carrier disclose the customer's CPNI to any other "person," whether or not that person is an affiliate of the telecommunications carrier in possession of the CPNI.[10]

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[9]CPI at 2. Beyond the general premise, however, CPI generally misses the mark by inappropriately blending the requirements of Section 222 with those of Section 272 or Section 274. The result of this blending is that CPI, along with other commenters, in effect substitutes the term "BOC" for the term "telecommunications carrier" within Section 222, thereby minimizing the statutory burden upon generic "telecommunications carriers," but multiplying it for BOCs--all without an analysis of the burden that Congress actually placed on BOCs through Sections 272 and 274. See CPI at 4-10.

[10]As set forth in SBC's Further Comments, under Section 222(c), the use, disclosure, and access allowed to or through a telecommunications carrier with whom the customer has a relationship, as set forth in Section 222(c)(1), must not be confused with the means by which customers may require a telecommunications carrier to disclose CPNI to other persons, as set forth in Section 222(c)(2). Section 222(c)(1) addresses customers' CPNI-related privacy expectations in CPNI developed between a customer and the serving carrier. Nothing in Section 222(c)(1) requires the serving carrier to disclose CPNI to a third party. Section 222(c)(1) establishes the governing customer privacy requirements where CPNI is employed "in [the serving carrier's] provision" of certain services or otherwise pursuant to the customer's approval. CPNI that a carrier receives or obtains by virtue of providing telecommunications service may be used, or disclosed, without customer approval, in its provision of Section 222(c)(1)(A) or (B) services. With customer approval, a carrier may use or disclose CPNI for any designated purpose, whether or not the use constitutes a subparagraph (A) or (B) purpose.

Although the language of Section 222(c)(1) permits a carrier to "disclose" CPNI to an affiliate (a carrier does not "disclose" to itself; rather, it "uses" CPNI), nothing in Section 222(c)(1) requires the carrier to disclose CPNI to a third party. Elsewhere in Section 222, Congress imposed conditional disclosure obligations in connection with Aggregate Customer Information, Subscriber List Information, and requests made to the carrier in possession of the CPNI by persons authorized by the customer. It did not impose any such obligations within Section 222(c)(1) in connection with CPNI.

Section 222(c)(2), conversely, specifically requires disclosure of CPNI to "persons" the Commission references as "third parties"; this section alone controls whether, and under what circumstances, CPNI must be disclosed when the customer requests disclosure.

It is only where access to CPNI is obtained by a "stranger" to the customer/carrier relationship that questions arise. The writing requirement of Section 222(c)(2) is intended to provide an extra measure of security to the customer for the release of CPNI that applies to instances where customers' expectations of privacy are heightened.[11] If the Commission undermines the protection of customers' reasonable expectations of privacy from persons subject to Section 222(c)(2), it will have advanced the cause of those that would ignore the privacy expectations of consumers to use CPNI contrary to consumers' desires--much as renegade IXCs have "slammed" customers in the long-distance marketing arena.

For these reasons, it is reasonable to allow a notice and opt-out form of approval to telecommunications businesses with respect to their use of CPNI or where they disclose or permit access to such CPNI to their affiliates. However, it is not reasonable to conclude that the same form of approval is sufficient to apprise customers that their CPNI may be provided to those outside of the business enterprise.

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[11]For example, an arbitrator for the Texas Public Utility Commission has reached a similar result in Petition of AT&T Communications of the Southwest, Inc., for Compulsory Arbitration to Establish an Interconnection Agreement Between AT&T and GTE Southwest, Inc., and Contel of Texas, Inc., Docket No. 16300, and Petition of MCI Telecommunications Corporation and Its Affiliates Including MCIMetro Access Transmission Services, Inc., for Arbitration and Mediation Under the Federal Telecommunications Act of 1996 of Unresolved Interconnection Issues With GTE Southwest, Inc., Docket No. 16355, Arbitration Award at 26 (ruling in the Arbitration Award that "[t]he Arbitrator believes that unfettered access to "potential" customer information culd lead to unnecessary and unwarranted disclosure of customer proprietary network information, and therefore concludes that written authorization is required for the provision of access to this customer information pursuant to [1996 Act] § 222(c)(2).").

B. THE USE, DISCLOSURE, AND PERMISSION OF ACCESS TO CPNI FALL WITHIN THE SECTION 272(g)(3) "MARKETING AND SALE OF SERVICES" EXEMPTION FROM THE OBLIGATIONS OF SECTION 272(c)(1).

1. CPNI IS A "JOINT MARKETING" TOOL.

The Commission should not depart from its oft-stated recognition that CPNI is integral to the joint marketing of multiple services. Contrary to the internally inconsistent comments of some, the Commission should conclude that a BOC's use of CPNI, or its provision or permitting access to CPNI to a Section 272 affiliate for joint marketing purposes are exempted activities under Section 272(g)(3).

The Commission's CPNI-related decisions have frequently observed that CPNI can be useful, if not necessary, in integrated marketing and sales campaigns. For example, when the Commission authorized BOCs to engage in the integrated marketing of basic and enhanced services, the Commission stated that it "intended to increase the ability of [the BOCs and AT&T] to use their networks to offer such integrated services on an efficient basis."[12] The Commission spoke of its accompanying CPNI rules as a means of "promoting this goal," and acknowledged that CPNI can be used "to identify certain customers" and "to market an appropriate package" of services to such customers.[13]

In rejecting a mass prior authorization rule, the Commission reasoned that such a rule "would vitiate a BOC's ability to achieve efficiencies through integrated marketing to smaller customers."[14] The integrated marketing authority Congress has conferred on the BOCs (for local

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[12]In the Matter of Amendment to Section 64.702 of the Commission's Rules and Regulations, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd 1150 (1988) ("Computer III Recon Order"), para. 97.

[13]Id.

[14]In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571

and long distance services) is similar to that which the Commission earlier conferred on the BOCs (for basic and enhanced services). Just as a prior authorization rule would have vitiated the BOC's previously-granted Commission authority in the area of enhanced services, so too would requiring BOCs to disclose to their long distance competitors CPNI used in joint marketing and sales activities vitiate their Congressionally-allowed authority.[15]

More recently, in its Universal Card Order, the Commission explicitly recognized that joint marketing "necessarily involves" the sharing of CPNI.[16] In rejecting the claim of AT&T's credit card competitors that they should be permitted access to the CPNI that AT&T had shared with its non-regulated credit card operations, the Commission stated:

> ATTC may share this material with a non-regulated affiliate entity, whether structurally or non-structurally separate. This is closely analogous to joint marketing under certain safeguards, which necessarily involves sharing of some customer network information with a non-regulated affiliate to promote goods and services which involve both regulated and non-regulated functions.[17]

On the other hand, the Commission need not and should not conclude that CPNI must be "essential" to the BOCs' joint marketing or selling activity in order to qualify for the Section 272(g)(3) exemption.[18] The Commission should reject AT&T's sleight-of-hand suggestion that

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(1991), at para. 85, n.155.

[15]Such a requirement would also violate the letter and spirit of Section 272(g)(3) and the Non-Accounting Safeguards First Report and Order.

[16]Universal Card Order, paras. 24-27.

[17]Id., at para. 27.

[18]In any event, there is no meaningful difference between CPNI being "necessarily involved" in joint marketing and CPNI being "required" in joint marketing. Reference to Commission precedent alone, therefore, requires that AT&T's point be rejected. Simply put, a BOC's use of CPNI to support joint marketing and sales,and its provision of CPNI to a Section 272 affiliate for such a purpose, are activities permitted on an exclusive basis within Section 272(g)(3). Stated another way, Section 272(c)(1) places no nondiscrimination obligation with regard to CPNI used for marketing or sales purposes.

the exemption applies only where it demonstrated that the activity at issue is "an essential ingredient" of joint marketing.[19] As even AT&T admits, no language requiring an activity to be "essential"--or even important--appears in the statute,[20] and there is no basis on which to read it into the statute.[21]

Moreover, AT&T's own words outside of this docket state the opposite of its words to the Commission in this docket. AT&T's senior management has boasted loudly of its marketing database which houses information regarding the "wants, needs, buying patterns, and preferences" of nearly 75 million AT&T customers.[22] Notwithstanding its significant other cost cutting measures, AT&T candidly recognizes the value of this "database marketing capability" as an "enormous opportunity" to "understand customers for communications services better than anyone else."[23] AT&T's development and use of its database, and its resulting ability to "understand" its customers, all are meant to market and sell to these customers.

Notwithstanding AT&T's gratuitous views on how the BOCs could market without using CPNI, the California Public Utility Commission correctly concludes that "[S]ection 272(g) . . . does allow BOCs to joint market with affiliates using CPNI collected by the BOC."[24] Yet, the

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[19]AT&T at 16.

[20]Though inconsistent with the "test" AT&T advances, AT&T's pleading correctly notes that Section 272(g)(3) nowhere requires that the activity must be "an essential ingredient" in order for the activity to be exempted. AT&T at 16, n.17.

[21]There is no basis under Section 222 for the Commission to diminish the broad scope of the joint marketing freedoms of Section 272(g). The Commission should not use this docket to redefine a concept more properly within the scope of CC Docket No. 96-149.

[22]Ameritech at 3, n.2.

[23]Id.

[24]CPUC at 3.

CPUC's conclusion does not go far enough because it too narrowly defines joint marketing. The joint marketing freedoms allowed by Congress are not limited to instances where "a BOC may joint market its own local service and interexchange services of an affiliate."[25] Rather, they also encompass any BOC affiliate's joint marketing and sale of local and interexchange services and are intended to be at parity with those of non-BOC telecommunications carriers.[26] As the Commission has noted in a different context, separate services permitted under the law to be jointly marketed may be provided "under a variety of business organizational structures."[27] This recognition is consistent with the express grant of authority provided by Section 272(g)(1) allowing a Section 272 affiliate to market local exchange services, and the lack of any prohibition against another affiliate's performing joint marketing functions upon the grant of interLATA authority.[28]

2. THE GENERALITIES OF SECTIONS 201 OR 202 DO NOT OVERRIDE THE SPECIFICS OF SECTIONS 222, 272, AND 274

Some parties argue that the exercise of the joint marketing freedoms Congress expressly authorized under Section 272(g) should be halted by general language found elsewhere in the 1996 Act.[29] Bootstrapping an argument that Sections 201(b) and 202(a) can be used in conjunction with Section 272(f) to achieve a result at odds with both the letter and spirit of

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[25]Id.

[26]See Non-Accounting Safeguards First Report and Order, para. 291.

[27]In the Matter of Southwestern Bell Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, Memorandum Opinion and Order, 7 FCC Rcd 7294 (1992), n.19.

[28]While several commenters attempt to diminish the essential utility of CPNI as marketing in nature, none answers the question of why, if CPNI is not a quintessential marketing tool, there is a competitive issue associated with it.

[29]See MCI at 21.

Section 272(g), MCI attempts to override the specifics of the 1996 Act with general, common-carrier non-discrimination obligations.

In the context of the treatment of CPNI, Section 222 is the more specific statutory provision. In addition, where applicable, Sections 272 and 274 provide specific non-discrimination requirements. Overlaying the more general non-discrimination requirements of Section 201(b) and 202(a) as a supplement to the more specific Sections 222, 272, or 274 violates canons of statutory construction.[30] CPNI is governed by Section 222.

Contrary to MCI's contentions,[31] there is no generally applicable non-discrimination obligation under the 1996 Act that supersedes the express treatment of CPNI under Section 222.[32] There is no requirement in the 1996 Act--whether under Communications Act Sections 201 or 202 or otherwise--that a telecommunications carrier disclose CPNI to persons outside the scope of a customer's Section 222(c) authorization. A BOC's solicitation of the use of CPNI from its own customers, whether or not for the benefit of affiliates that offer services contemplated to be within the scope of Section 272, does not require that a similar service be provided to non-affiliates.

As set forth above, and contrary to some commenters' protestations, in a joint marketing context, a BOC can act exclusively with its Section 272 affiliate. At the same time, however, Cox is correct in stating that Section 272(g)(3) does not "trump" the requirements of Section 222.[33] As SBC pointed out in its Further Comments, a joint marketing purpose for CPNI is not

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[30]Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

[31]MCI at 22.

[32]See, e.g., Non-Accounting Safeguards First Report and Order at 182, 202-36.

[33]Cox at 8; See also Airtouch at 7.

meaningful unless the use, disclosure, or permitted access is approved or authorized in the requisite manner under Section 222. In addition to Section 272's limitations, Section 222(c)(1) limits the BOC's use, disclosure, or permitted access to CPNI to Section 222(c)(1)(A) and (B) activities or to any other purpose the customer approves. Section 222(c)(2) also requires a BOC to disclose CPNI to anyone of the customer's choosing when authorized in writing. After customer permission is obtained, neither Section 222(c)(1) nor (2) impose limitations on the use of CPNI in Section 272(g)(1) or (2) activities within the scope of the customer's authorization.

As SBC pointed out in its Further Comments, the Commission's application of Section 272 in the Non-Accounting Safeguards First Report and Order and other Commission precedent collectively contemplate that the BOC and its affiliates can share or use CPNI on an exclusive basis in support of responses to customer inquiries,[34] to perform sales functions,[35] to process orders for services requested, and other activities, the propriety of which will be decided on a case-by-case basis,[36] to "identify potential customers . . . and formulate proposals to those customers,"[37] to "identify certain customers whose telecommunications needs are not being met effectively and to market an appropriate package of enhanced and basic services to such customers."[38] Indeed, in the BankAmerica docket, the Commission recognized that joint marketing "necessarily involves" sharing of CPNI.[39] No commenter has rebutted this precedent.

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[34]Non-Accounting Safeguards First Report and Order, para. 296.

[35]Id.

[36]Id.

[37]Phase II Supplemental NPRM, CC Docket No. 85-229, FCC 86-253 (released June 16, 1986), para 55.

[38]Phase II Recon. Order, 3 FCC Rcd 1150 (1988), para. 97.

[39]BankAmerica v. AT&T Corp., 8 FCC Rcd 8782, para. 27 (1993).

C. EVEN APART FROM THE EXEMPTION STATED IN SECTION 272(g)(3), SECTION 272(c)(1) HAS NO APPLICATION WHERE A BOC USES CPNI OR PROVIDES IT TO A NON-SECTION 272 AFFILIATE.

While the Commission has concluded that CPNI is "information" within the meaning of Section 272(c)(1), a BOC's use of CPNI as well as its provision of such CPNI to a non-Section 272 affiliate, is not subject to the non-discrimination provisions of this section of the 1996 Act.[40] Section 272(c)(1) bars BOC discrimination in the "provision" of goods, services, facilities or information to its Section 272 affiliate. Given Congress' use of the term "provision," the Commission determined in the Non-Accounting Safeguards First Report and Order that the Section 272(c)(1) obligation extends to information and other specified items "that a BOC provides to its Section 272 affiliate."[41] This obligation is, therefore, limited. It does not extend to instances where covered items (including CPNI, as noted in the order) either are used by the BOC alone or provided to an affiliate other than its Section 272 affiliate.[42] No commenter

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[40]Non-Accounting Safeguards First Report and Order, para. 222. In addition, as Bell Atlantic points out (Bell Atlantic at 6), an agent's use of CPNI in behalf of a principal does not constitute either "disclosure" of CPNI (as described in Sections 222(c)(1) or (2)) or "access" to CPNI (as described in Section 222(c)(1)). See definitions of "agency" and "agent," BLACK'S LAW DICTIONARY, at 57-59 (5th ed., 1990). At the same time, however, the agent's "use" of the principal's CPNI is governed by the requirements of Section 222 that affect the activities of the principal.

[41]Id at para. 218.

[42]At several points in its Order, the Commission emphasized its limited interpretation of subsection (c)(1). See, e.g., para. 178: "[T]o the extent that a BOC provides services to its Section 272 affiliate, it must provide them to other entities on the same rates, terms, and conditions, pursuant to Section 272(c)(1);" para. 210: "[W]e conclude that the protection of Section 272(c)(1) extends to [items] that a BOC provides to its Section 272 affiliate;" and para. 212: A prima facie case of unlawful discrimination is stated where a BOC has not provided unaffiliated entities items "that it provides to its Section 272 affiliate."

demonstrated in further comments that the Commission has the authority to alter its limited interpretation of the phrase "provision of" outside the CC Docket No. 96-149 proceedings.[43]

D. THERE IS NO REASON TO CONCLUDE THAT BOC CPNI IS MORE VALUABLE TO SUCCESSFUL ENTRY IN THE INTERLATA MARKET THAN THAT ALREADY HELD BY INTEREXCHANGE CARRIERS.

The Commission should not upset the Congressional determination that Section 222 should apply evenhandedly to all "telecommunications carriers" by considering the possibility that it might allow subclasses of carriers to obtain access to BOC CPNI without the customer's requisite authorization. IXCs like AT&T, for instance, are already fully armed with vast amounts of pertinent CPNI regarding their own long distance customers' "wants, needs, buying patterns, and preferences."[44] Moreover, the CPNI possessed by the BOCs is no better, and likely is less beneficial, than that held by IXCs, and nothing in the record shows otherwise.[45] Thus, even if there was a statutory basis upon to rest its ruling, the Commission should not conclude that IXCs are in any need of the BOCs' CPNI.

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[43]While a BOC's CPNI-related correspondence with its customers is neither an "approval solicitation service" provided to its Section 272 affiliate nor a "transaction" (see infra), to the extent that the Commission rules otherwise, such a process is not subject to the limitations of Section272(c)(1) for the reasons set forth in this section.

[44]See also Ameritech at 3, n.2.

[45]In a different, but equally applicable pre-Act context, the Commission observed that the BOCs' CPNI "does not endow them with an overwhelming competitive advantage for purposes of marketing enhanced services. Indeed, since the BOCs have been prohibited by the [MFJ] from providing most enhanced services, many enhanced service vendors may currently have more valuable competitive information about the enhanced services market than the BOCs." Phase II Recon Order, para. 97. AT&T's information regarding at least 75 million long distance customers clearly is more valuable in terms of the interexchange market than the CPNI possessed by the BOCs who have not as yet entered the long distance market.

E. NOTHING IN THE 1996 ACT REQUIRES THAT BOCS OFFER CPNI SOLICITATION SERVICES.

Section 272(c) is completely independent of Section 222. Applicable only to BOC Section 272 affiliates in a non-joint marketing context, Section 272(c)(1) requires only non-discriminatory treatment of BOC Section 272 affiliates vis-a-vis similarly situated, non-affiliated "entities." Under Section 272, it does not matter what the BOC undertakes to do itself, but rather, what it "provides" to its Section 272 affiliate. Section 272 limits the interaction of the BOC and its Section 272 affiliates and requires, subject to the joint marketing freedoms authorized under Section 272, that the services, information, facilities, and standards that are provided to the Section 272 affiliate are provided on a non-discriminatory basis to similarly situated non-affiliates.

Solicitation of customer approval to use CPNI, however, is not a "service" provided to an affiliate. Rather, CPNI itself is "information"[46] that may be "provided to" a Section 272 affiliate. CPNI is integral to the exercise of Section 272's joint marketing freedoms which may be used, disclosed, or accessed within the scope of customer approval. No Section 272 non-discrimination obligation arises until after the BOC "provides" something to its Section 272 affiliate, and a BOC cannot provide CPNI to its affiliate without the requisite customer approval. The non-discrimination obligation is limited to that which a BOC gives to a Section 272 affiliate (e.g., "information").

Nothing in Section 222 requires a BOC to solicit approval for unaffiliated entities. The beneficiary of Section 222 is the customer and his or her privacy interest. Any non-discrimination obligation resides in Section 272. At issue under Section 272 is what is received by the Section

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[46]Non-Accounting Safeguards First Report and Order at para. 222.

272 affiliate. In the case of CPNI, it is information that the affiliate may receive, and not any "solicitation" which may occur solely between the carrier and its customer. Assuming a non-discrimination obligation arises under Section 272 for non-marketing and sales activities, the non-affiliates have a right to similar information,[47] but only if the requisite customer authorization is given under Section 222.[48]

F. BOC SOLICITATION OF ITS CUSTOMERS FOR PERMISSION TO USE, DISCLOSE, OR PERMIT ACCESS TO CPNI IS NOT A "TRANSACTION."

The actual exercise of obtaining customer approval is not a "transaction with the Bell operating company." It is, instead, correspondence between the BOC and its customer. The solicitation may advance in part the joint marketing interests of both the BOC and its Section 272 affiliates. However, CPNI solicitation is also an activity required to make the BOC an effective participant in joint marketing activities. Potentially, this joint marketing activity results in the passing of information. The "transaction," however, if any, associated with the BOC's seeking customer approval is not the solicitation service. It is instead, the passing of information. The joint marketing transaction that exists between the BOC and its Section 272 affiliate, unlike the solicitation activity, is subject to the same "arm's length" and accounting requirements as any other business dealing between the parties.

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[47]Of course, even if the Commission determines "solicitation approval" to be a service, the non-discrimination requirement is inapplicable because of the joint-marketing exemption contained in Section 272(g)(3).

[48]As US West points out, the First Amendment to the United States Constitution likely restricts the extent to which the Commission could order the institution of a solicitation service. US West at 19.

G. SECTION 274 HAS NO COROLLARY NON-DISCRIMINATION REQUIREMENTS.

Contrary to the contentions of AT&T and Cox,[49] Section 274(c)(2)(A) only imposes a nondiscrimination requirement on the provision of "inbound telemarketing or referral services." Section 274(c)(2)(A) does not impose a nondiscrimination requirement on the provision of either information or services generally. Most importantly for this proceeding, Section 274(c)(2)(A) does not impose any nondiscrimination requirement on a BOC with respect to the use, disclosure, or permission of access to CPNI.[50]

Accordingly, only Section 222 affects CPNI in the context of a BOC and a Section 274 affiliate. To the extent that the BOC has obtained approval to use, disclose, or permit access to CPNI pursuant to Section 222(c)(1) for its affiliated or related electronic publishing entity or joint venture, it may do so. Where unaffiliated entities seek similar access, but have not obtained requisite customer authorization pursuant to Section 222(c)(2), the BOC may not use, disclose, or permit access to CPNI in providing inbound telemarketing to entities not within the scope of the Section 222(c) authorization.

Similarly, Section 274(c)(2)(B) does not apply to the BOC's own use of CPNI or affect the obligations of entities that seek to use CPNI pursuant to Section 222(c). A BOC is required to provide "basic telephone service information," subject to the further requirements of Section 222(c), on a nondiscriminatory basis. As the Commission held in the Electronic Publishing First Report and Order, a BOC may provide to the teaming arrangement the necessary facilities, services, and basic telephone service information for electronic publishing, so long as the BOC

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[49]AT&T at 21; Cox at 11.

[50]Section 222(d)(3) permits the use of CPNI for inbound telemarketing, referral, or administrative purposes. Section 222(d) does not impose any obligation on a BOC, except to the extent that it is a telecommunications carrier.

does not favor a teaming arrangement with a separated affiliate over an arrangement with an unaffiliated electronic publishing provider.[51] If the BOC provides CPNI to its separated affiliate in connection with an electronic publishing teaming or business arrangement, it must provide the CPNI to any teaming arrangements with unaffiliated electronic publishers on nondiscriminatory terms, provided they also have the requisite customer authorization.

As with a Section 272 affiliate, the BOC's seeking approval from customers does not itself constitute a transaction with its Section 274 affiliate. The act of seeking approval may, however, be the result of a transaction that the BOC entered into with a Section 274 affiliate. That underlying transaction would itself be subject to Section 274(b)(3), but special requirements are not applicable simply because a transaction may relate to CPNI. Instead, the BOC and its Section 274 affiliate must comply with the requirements that will be adopted pursuant to the Commission's Further Notice of Proposed Rulemaking in CC Docket No. 96-152.

III. CONCLUSION

While BOCs have a limited nondiscrimination obligation under Section 272(c) and certain limitations upon joint marketing under Section 274, Congress intended that the consumer alone ultimately should determine whether, when, and to whom his or her CPNI is released pursuant to the mechanisms codified in Section 222. There is no direct linkage between Section 222 and either Section 272 or Section 274. Reading of the 1996 Act to the contrary, as some commenters have, effectively supersede the privacy interest Congress determined to protect under Section 222 with the limited obligations of Sections 272 and 274. There is neither a statutory construction nor

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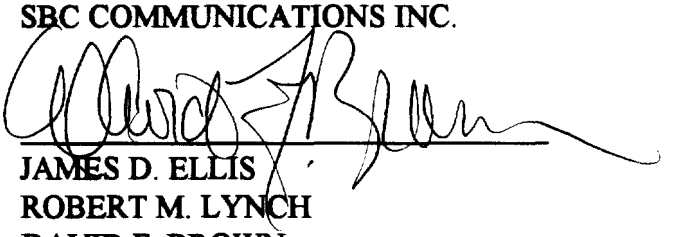
[51] In the Matter of the Implementation of the Telecommunications Act of 1996, Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, First Report and Order and Further Notice of Proposed Rulemaking (rel. February 7, 1997) (the "Electronic Publishing First Report and Order"), at para. 168.

a policy basis for this result. The Commission should not promulgate rules inconsistent with the statutory scheme of the 1996 Act.

Respectfully Submitted,

SBC COMMUNICATIONS INC.



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MARCH 24, 1997

CERTIFICATE OF SERVICE

I, Linda Warner, hereby certify that the foregoing Reply Comments of SBC Communications Inc. To Responses to Specific Questions in CC Docket No. 96-115 have been served this the 27th day of March, 1997, to the Parties of Record.

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March 27, 1997

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